SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDWARD D. E. ROLLINS,
Attorney General;
J. EDGAR HARVEY,
Deputy Attorney General;
FRANCIS D. MURNAGHAN, JR.,
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Counsel for Appellee.

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STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM.

The State of Maryland, Appellee in the above entitled cause, by its counsel, Edward D. E. Rollins, Attorney General, J. Edgar Harvey, Deputy Attorney General, and Francis D. Murnaghan, Jr., Assistant Attorney General, for its Statement in Opposition to Appellant's Statement of Jurisdiction herein, and in support of its Motion to Dismiss or Affirm, respectfully shows the following:

I

Statement of Issues on Appeal

The question raised by this appeal is whether the State of Maryland may constitutionally impose the duty of collection of its use tax upon a vendor whose principal place of business is located in Wilmington, Delaware, and whose contacts with the State of Maryland are:

1. Deliveries to points in Maryland, in the vendor's trucks, at the expense of the vendor, of goods sold to Maryland residents.

2. Deliveries to points in Maryland by common carrier, at the expense of the vendor, of goods sold to Maryland residents.

3. Advertisements sent from Wilmington, Delaware, by mail or radio broadcast to Maryland residents.

The tax collection duty has been imposed with respect to goods sold to Maryland residents, and delivered to them:

(a) In the vendor's trucks, at the vendor's expense;
(b) By common carrier at the vendor's expense; and
(c) Directly at the vendor's place of business in Wilmington, Delaware.

The Court of Appeals of Maryland determined that the Maryland Use Tax Act, Article 81, Sections 368 through 396 of the Annotated Code of Maryland (1951 Ed.) required that Appellant collect use taxes with respect to goods delivered in all three manners, and further held that this requirement violated neither the Commerce Clause, Article I, Section 8, of the Constitution of the United States, nor the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

II

No Substantial Federal Question Is Presented by the Attempted Appeal

A. Commerce Clause

Appellant's contentions under the Commerce Clause have been completely foreclosed by decisions of the Supreme Court of the United States sustaining use taxes imposed by the State of receipt on goods transported in interstate commerce. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939). Appellant acknowledges that the Maryland Use Tax itself is valid and may be imposed against the Maryland pur-

chasers from it, even though the goods involved moved in interstate commerce, contesting only the requirement that Appellant collect use tax on behalf of the State. However, it is beyond dispute that the duty to collect such taxes may be imposed upon a vendor located and doing business in Maryland, even as to goods which had been transported in interstate commerce. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934). The impact on such commerce would be exactly the same whatever variations in method of collecting the tax may be imagined. The cost of marketing the goods is not affected by the character of the tax collector pressed into service by the State. Hence, even were Appellant completely unconnected with the State of Maryland, imposition of the tax collecting duty upon it could not be deemed to create a burden upon interstate commerce, whatever the objections that might be raised under the Due Process Clause. The combined onus of the tax and of the duty of collecting it in its effect upon interstate commerce is identical, whether the private tax collecting agent appointed by the State is located within or without the State, or whether his activities are local or interstate in character. Appellant confuses the imposition of a burden on interstate commerce, which is prohibited by the Constitution, with the imposition of an obligation upon someone engaged in interstate commerce, which will not run afoul of the commerce clause so long as the commerce itself is not thereby burdened. It is fully established that the restriction by the vendor of its activities to ones solely interstate in character does not prohibit the imposition of the duty to collect use taxes. *General Trading Co.* v. *State Tax Comm. of Iowa*, 322 U. S. 335 (1944); *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939).

Furthermore, Appellant confuses a tax, which might be invalid if imposed upon an instrumentality of interstate

commerce, with the duty of tax collection which cannot be conceived of as a burden on the collector, at least so long as adequate provision for compensating the costs which he incurs is made. Thus, in *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41 (1940), a tax collecting duty placed upon a Federal instrumentality was upheld, although it was acknowledged that imposition of the tax itself upon the Federal instrumentality would have been unconstitutional. As in that case, a tax collector under the Maryland Use Tax Law is entitled by Section 384 of Article 81 of the Annotated Code of Maryland (1951 Ed.) to retain 3% of tax collections to cover his expenses.

Maryland competitors of Appellant reap no advantage over Appellant as a result of the decision of the Maryland Court of Appeals, for they too must collect a sales or use tax of equal amount on their sales to Maryland residents. Indeed, were Appellant and others similarly situated not obliged to collect use taxes on sales in the Maryland market they would enjoy an unwarranted competitive advantage over Maryland merchants who must contribute to the support of the government which creates and protects the market. It is not the purpose of the Commerce Clause to foster such discrimination. *International Harvester Co.* v. *Dep't of Treasury*, 322 U. S. 340 (1944); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940).

B. Due Process Clause

Since the decision of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), it is manifest that, in so far as the due process clause is concerned, a State may let the impact of its laws be felt by anyone who conducts activities within the State which are reasonably related to the laws involved. The fact that a corporation, such as Appellant, is not "doing business", in the traditional sense, does not

render it immune from State regulation of such activities as it does conduct within a State's borders. Here we are concerned with activities of Appellant designed to enter and tap the market created under, protected by and existing because of the laws of the State of Maryland. The obligation here enforced against Appellant grows out of and is solely concerned with such activities. In so far as goods delivered in Appellant's own trucks to Maryland residents are concerned, there is no substantial due process objection, in view of the holding in *General Trading Co.* v. *State Tax Comm. of Iowa*, 322 U. S. 335 (1944). Delivery of the very goods with respect to which the tax collecting duty is imposed is at least as substantial activity in Maryland as generalized solicitation, the activity deemed sufficient in that case to justify imposition of the duty. Delivery by the vendor is well established to be a local activity subject to regulation and specifically to the duty of collection of tax. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940).

In so far as delivery by a common carrier is concerned *where the expense is borne by the vendor*, it is not in issue in this case whether such activity standing alone provides enough contacts with the State of Maryland to satisfy the due process clause. Here, such deliveries are only part of Appellant's over-all entry into the Maryland market. Since some of that entry, for reasons stated above, is clearly within the jurisdiction of the State, the tax collection duty may also be imposed with respect to the goods delivered by common carrier. In *Nelson* v. *Sears-Roebuck & Co.*, 312 U. S. 359 (1941), and *Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U. S. 373 (1941), the right to require collection of use tax was upheld with respect to goods mailed or shipped by common carrier from without the State, on unsolicited orders sent by the purchasers to a place of business of the

vendor located in another State. The vendor conducted other business within the State clearly subject to its control and the Court held that the mail-order activities were part of the vendor's general business in the State and thus subject to the State Use Tax Law.

The third category of goods, those delivered to Maryland purchasers in Wilmington, Delaware, might, on first blush, appear to present an issue beyond settled decisions of the Supreme Court. However, it is important to realize that the assessment made by the Maryland taxing authorities, in respect to such goods, was made solely on the basis of information volunteered by Appellant. In preparing the Agreed Statement of Facts, on which this case has been tried, the Maryland taxing authorities accepted the determination by Appellant of the amounts of sales falling into each of the three categories here concerned. Thus, it is evident that the instances, as to which the assessment was made, where delivery was effected at Appellant's store in Wilmington, Delaware, were all ones in which Appellant knew at the time of the sale that the goods would be used, consumed or stored in Maryland. No attempt is here made to assert a tax collecting duty with respect to deliveries made in Delaware where the ultimate destination of the goods was unknown by the vendor at the time of sale, and it only subsequently developed that the goods were in fact brought to Maryland. Admittedly the record does not fully reveal this limitation upon the assessment with respect to goods delivered in Wilmington. However, we deem it essential to bring the point to the Court's attention for it is jurisdictional in nature. No case or controversy is here presented with respect to goods delivered by Appellant in Wilmington, Delaware, without knowledge that they would be used, consumed or stored in Maryland. If the Agreed Statement of Facts to any extent suggests that such a situa-

tion is presented, it inadvertently presents a hypothetical, not a real picture. The Supreme Court will not consider abstract propositions, particularly ones involving constitutionality of legislation, in the absence of an actual case or controversy. See e.g. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249 (1933).

Since Appellant knew in all cases when delivery was made in Delaware that the goods were being sold to Maryland residents for use there, the situation is no different than that dealt with in *Nelson* v. *Sears-Roebuck & Co.*, 312 U.S. 359 (1941). In that case delivery to the purchaser was accomplished outside the State asserting the tax collecting duty, since delivery was by mail or common carrier. Cf. *Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U.S. 373 (1941) f.n. 3.

We, therefore, submit that the questions presented in this appeal have been so definitely determined that no substantial question is presented entitling Appellant to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, Appellee respectfully moves that the appeal be dismissed or that the judgment and Order of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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ACKNOWLEDGMENT OF SERVICE OF THE FOREGOING DOCUMENT, DATED JUNE 16th, 1953, OMITTED IN PRINTING.

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